

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

MOUNIR KUBLAWI,
Plaintiff,
vs.
DOUGLAS GALLASPIE,
Defendants.

3:07-cv-00208-LRH-VPC

REPORT AND RECOMMENDATION
OF U.S. MAGISTRATE JUDGE

June 1, 2009

10 This Report and Recommendation is made to the Honorable Larry R. Hicks, United States
11 District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28
12 U.S.C. § 636(b)(1)(B) and LR IB 1-4. Before the court is defendant's motion to dismiss (#19).
13 Plaintiff opposed (#21), and defendant replied (#22).¹ For the reasons stated below, the court
14 recommends that defendants' motion to dismiss (#19) be granted.

I. HISTORY & PROCEDURAL BACKGROUND

16 Plaintiff Mounir Kublawi (“plaintiff”) is currently incarcerated by the Nevada Department
17 of Corrections (“NDOC”) at Northern Nevada Correctional Center (“NNCC”) (#11). Plaintiff
18 brings this action pursuant to 42 U.S.C. § 1983, alleging that defendant violated his Eighth and
19 Fourteenth Amendment rights while he was held at Clark County Detention Center. (“CCDC”)
20 *Id.* Plaintiff names as a defendant Douglas Gillespie,² Sheriff of Clark County, and brings his
21 claims against Gillespie in his official capacity only. *Id.*

22 Plaintiff's complaint includes one count of alleged constitutional violation. Plaintiff states
23 that in February 2006, he was hit by a car and suffered a head injury. *Id.* p. 3. Plaintiff was taken
24 to Desert Springs Hospital and suffered memory problems after the accident. *Id.* Plaintiff was

26 ¹Plaintiff also filed a response to defendant's reply (#23). However, Local Rule 7-2 does not
27 allow for a response to a reply. Therefore, plaintiff's additional response (#23) is stricken.

²⁸Improperly named in the complaint as Douglas Gallaspie.

1 held at CCDC From March 2006 through December 2006. *Id.* Plaintiff alleges that he submitted
 2 numerous medical kites and grievances to CCDC staff. However, CCDC staff continually and
 3 intentionally disregarded and ignored plaintiffs medical complaints. *Id.* p. 4. Such disregard has
 4 caused plaintiff to suffer from constant memory problems. *Id.* Plaintiff states that he is not
 5 seeking compensatory damages; rather, he is seeking an examination by a neurologist and a brain
 6 scan or MRI. *Id.*

7 The court notes that the plaintiff is proceeding *pro se*. “In civil cases where the plaintiff
 8 appears *pro se*, the court must construe the pleadings liberally and must afford plaintiff the benefit
 9 of any doubt.” *Karim-Panahi v. Los Angeles Police Dep’t*, 839 F.2d 621, 623 (9th Cir. 1988); *see also Haines v. Kerner*, 404 U.S. 519, 520-21 (1972).

11 II. DISCUSSION & ANALYSIS

12 A. Discussion

13 1. Motion to Dismiss Standard

14 When considering a motion to dismiss for failure to state a claim upon which relief can
 15 be granted, all material allegations in the complaint are accepted as true and are construed in the
 16 light most favorable to the non-moving party. *Barnett v. Centoni*, 31 F. 3d 813, 816 (9th Cir.
 17 1994); *Russell v. Landrieu*, 621 F.2d 1037, 1039 (9th Cir. 1980). For the movant to succeed, it
 18 must appear beyond doubt that the plaintiff can prove no set of facts in support of his claim that
 19 would entitle him to relief. *Barnett*, 31 F. 3d at 816; *see also Rothman v. Vedder Park Mgt.*, 912
 20 F.2d 315, 316 (9th Cir. 1990).

21 Under section 1983, a plaintiff must allege that (1) defendants subjected him to the
 22 deprivation of a right, privilege or immunity guaranteed by the U.S. Constitution or U.S. law, and
 23 (2) that the defendant acted under the color of state law. *West v. Atkins*, 487 U.S. 42, 48 (1988);
 24 *see also Crumpton v. Gates*, 947 F.2d 1418, 1420 (9th Cir. 1991). “Conclusionary allegations,
 25 unsupported by facts, [will be] rejected as insufficient to state a claim under the Civil Rights
 26 Act.” *Jones v. Community Redevelopment Agency*, 733 F.2d 646, 649 (9th Cir. 1984) (quoting
 27 *Sherman v. Yakahi*, 549 F.2d 1287, 1290 (9th Cir. 1977)). However, “the federal rules require
 28 only ‘a short and plain statement of the claim showing that the pleader is entitled to relief.’”

1 *Gilligan v. Jamco Development Corp.*, 108 F.3d 246, 249 (9th Cir. 1997) (*citing* Fed.R.Civ.P.
 2 8(a)). The issue on a motion to dismiss is not whether the plaintiff will ultimately prevail, but
 3 whether the plaintiff is entitled to offer evidence to support the claims. *Id.*, *citing Scheuer v.*
 4 *Rhodes*, 416 U.S. 232, 236 (1974).

5 **B. Analysis**

6 **1. Personal participation of Sheriff Gillespie**

7 Defendant argues that plaintiff's complaint should be dismissed because it fails to state a
 8 claim upon which relief can be granted (#19, p. 3). Specifically, defendant claims that he was not
 9 personally involved in any medical care plaintiff received or any medical decisions regarding
 10 plaintiff's care, and that plaintiff has not alleged that he "personally acted to cause a violation of
 11 Plaintiff's Constitutional rights by allegedly denying medical care." *Id.* p. 3-4. As there is no
 12 *respondeat superior* liability under 42 U.S.C. § 1983, defendant cannot be liable unless he was
 13 personally involved in the deprivation of plaintiff's rights. *Id.* p. 4.

14 Plaintiff responds that despite filing numerous medical requests and grievances at CCDC,
 15 he was completely ignored (#21). Plaintiff states: "The Department of Correction[s] did not feel
 16 responsible, but felt it's (sic) Clark County and whoever kept the Plaintiff in custody without
 17 treatment are responsible. Regretably (sic), legally it's CCDC staff, the County, and the Sheriff,
 18 Mr. Gillespie by his capacity as Sheriff of Clark County are directly responsible." *Id.* p. 2.

19 Defendant replies that plaintiff has still "failed to provide any clarification as to his claim
 20 that Sheriff Gillespie personally acted to cause a violation of Plaintiff's Constitutional rights by
 21 allegedly denying medical care... [and] it appears that Sheriff Gillespie in fact did not have any
 22 personal involvement with regard to any decision making as it pertains to medical treatment for
 23 Plaintiff." (#22, p. 3, emphasis in original).

24 "A person 'subjects' another to the deprivation of a constitutional right, within the meaning
 25 of section 1983, if he does an affirmative act, participates in another's affirmative acts, or omits
 26 to perform an act which he is legally required to do that causes the deprivation of which
 27 complaint is made." *Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir. 1978). "The requisite causal
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1 connection can be established not only by some kind of direct personal participation in the
 2 deprivation, but also by setting in motion a series of acts by other which the actor know or
 3 reasonably should know would cause others to inflict the constitutional injury." *Id.* "Liability
 4 under [section] 1983 arises only up on a showing of personal participation by the defendant. A
 5 supervisor is only liable for the constitutional violations of...subordinates if the supervisor
 6 participated in or directed the violations, or knew of the violations and failed to act to prevent
 7 them. There is no *respondeat superior* liability under [section] 1983." *Taylor v. List*, 880 F.2d
 8 1040, 1045 (9th Cir. 1989).

9 Plaintiff fails to explain how Sheriff Gillespie was personally involved in his medical care.
 10 It is not clear if defendant was even aware of plaintiff's medical problems. Plaintiff states that he
 11 made numerous requests to be treated by medical staff while he was housed at CCDC. However,
 12 plaintiff never specifies to whom these requests were made or if he ever spoke to defendant
 13 directly about his medical care, or the failure of CCDC staff to respond to his grievances. The
 14 court cannot assume that defendant had knowledge of plaintiff's medical conditions or whether
 15 plaintiff was being treated while at CCDC. Defendant's position of authority does not
 16 demonstrate that he had any personal involvement in decisions regarding plaintiff's health and
 17 medical treatment. As section 1983 liability arises only if a defendant personally subjected
 18 another to the deprivation of a constitutional right, there is no indirect supervisory or *respondeat*
 19 *superior* liability. Plaintiff does not allege that defendant was personally involved in denying him
 20 medical care; therefore, defendant's motion to dismiss (#19) is granted.³

21 III. CONCLUSION

22 Based on the foregoing and for good cause appearing, the court concludes that plaintiff
 23 has failed to state a claim upon which relief can be granted because Sheriff Gillespie was not
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25 ³Defendant also argues that plaintiff does not have standing to assert a claim under the Eighth
 26 Amendment because, as a pre-trial detainee, the Fourteenth Amendment would apply to any claim
 27 plaintiff has for insufficient medical care (#19). Although the court agrees that medical claims by
 28 pre-trial detainees should be brought under the Fourteenth, rather than the Eighth Amendment,
 plaintiff appears to have brought his complaint under both the Eighth and Fourteenth Amendments
 (#11, p. 4). However, the court need not address this argument because the motion to dismiss was
 granted on other grounds.

1 personally involved in providing or denying any medical care to plaintiff. As such, the court
2 respectfully recommends that defendants' motion to dismiss (#19) be **GRANTED**.

3 The parties are advised:

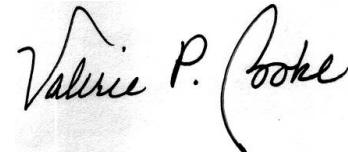
4 1. Pursuant to 28 U.S.C. § 636(b)(1)(c) and Rule IB 3-2 of the Local Rules of Practice,
5 the parties may file specific written objections to this report and recommendation within ten days
6 of receipt. These objections should be entitled "Objections to Magistrate Judge's Report and
7 Recommendation" and should be accompanied by points and authorities for consideration by the
8 District Court.

9 2. This report and recommendation is not an appealable order and any notice of appeal
10 pursuant to Fed. R. App. P. 4(a)(1) should not be filed until entry of the District Court's
11 judgment.

12 **IV. RECOMMENDATION**

13 **IT IS THEREFORE RECOMMENDED** that defendants' motion to dismiss (#19) be
14 **GRANTED**.

15 **DATED:** June 1, 2009.



16 **UNITED STATES MAGISTRATE JUDGE**

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